Student Contributions

Chart v. General Motors Corp.: Did It Chart the Way for Admission of Evidence of Subsequent Remedial Measures in Products Liability Actions?

On July 30, 1966, Penny Chart was seriously injured when the driver of a 1963 Corvair automobile in which she was riding lost control of the vehicle while rounding a curve. She subsequently brought suit to recover for her injuries, naming a number of parties,[1] including General Motors Corporation, the manufacturer of the Corvair, as defendants. Chart claimed that the Corvair's suspension had been defectively designed[2] and that the defect had caused the accident in which she was injured.[3]

During the six week trial, the court admitted, over the objections of counsel for General Motors, evidence that GM had redesigned the suspension of the 1964 and 1965 model Corvairs. In making their unsuccessful objections, counsel for General Motors argued that admission of the evidence violated Rule 904.07 of the Wisconsin Rules of Evidence, which bars the admission of evidence of subsequent remedial conduct offered "to prove negligence or culpable conduct."[4] The jury

1. Chart v. General Motors Corp., No. 8-331 (Cir. Ct. Vilas County, Wis. 1966). Chart also brought suit against the driver of the Corvair (alleging negligent operation of the automobile), Villas County (alleging negligent maintenance of the highway), and, in a separate action that was later consolidated, two state highway department employees (alleging negligent placement of a highway sign that was struck during the accident). *Id.* The owner of the automobile was later joined as a third-party defendant. Chart v. General Motors Corp., 80 Wis. 2d 91, 97, 258 N.W.2d 680, 682 n.1 (1977).

2. In its reply brief on appeal to the Supreme Court of Wisconsin, General Motors argued that plaintiff had tried the action, at least as it related to GM, on two theories: negligence and strict liability. Reply Brief of Appellant at 7. The supreme court determined that the case had been tried on only a strict liability theory, which it referred to as a defective design theory. *See* 80 Wis. 2d at 98, 99, 258 N.W.2d at 682, 683.

3. Specifically, Chart alleged that the Corvair's "swing axle" suspension tended to lift the rear of the vehicle during cornering, causing it to "oversteer"—that is, cut a path sharper than that intended by the driver. She further alleged that American drivers were not familiar with the swing axle suspension or the resulting steering characteristics, and that these factors had caused the driver of the auto in which she was riding to lose control. 80 Wis. 2d at 99, 258 N.W.2d at 683.

4. WIS. STAT. ANN. § 904.07 (West 1973), entitled "Subsequent remedial measures," provides as follows (emphasis added):

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove *negligence or culpable conduct* in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or *feasibility of precautionary measures*, if controverted, or impeachment or proving a violation of s. 101.11 [dealing with an employer's duty to furnish a safe place of employment].

Although numbered as statutes, the Wisconsin Rules of Evidence were promulgated by the Supreme Court of Wisconsin pursuant to the authority given it by WIS. STAT. ANN. § 751.12 (West Spec. Pamphlet 1979). In promulgating the Rules, the supreme court expressly reserved the power to "repeal, amend, modify, or otherwise amplify specific rules of evidence by individual decisions of this court without following general rule-making procedures of this court." 59 Wis. 2d R2 (1973).

returned a verdict of $777,674 for Penny Chart, apportioning[5] twelve percent of the liability to General Motors,[6] and GM appealed to the Supreme Court of Wisconsin.[7]

On appeal, counsel for General Motors argued that the trial court had committed error by admitting evidence of the redesign of the Corvair suspension.[8] The supreme court rejected this argument in an opinion written by Justice Day and affirmed the trial court's entry of judgment against GM.[9] Three members of the court dissented in an opinion written by Justice Connor Hansen.[10]

The issue addressed in *Chart* is particularly significant given the current interest in products liability lawsuits. Most states[11] have adopted section 402A of the Restatement (Second) of Torts, which permits recovery for personal injury or property damage caused by a defective product,[12] and almost every products liability action contains an allegation

5. WIS. STAT. ANN § 895.045 (West 1966 & Supp. 1979) provides as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.

6. The remaining liability was apportioned to the plaintiff (3%), the driver of the car (75%), Vilas County (5%), and the two highway employees (5%). 80 Wis. 2d at 99, 258 N.W.2d at 683. The trial judge granted a motion for judgment notwithstanding the verdict in favor of the state highway employees. *Id.* at 99, 258 N.W.2d at 683.

7. Until August 1, 1978, Wisconsin had no intermediate appellate courts. Appeals from the circuit courts, which had original jurisdiction over civil actions, were taken directly to the Supreme Court of Wisconsin. In 1977, Wisconsin voters approved an amendment to the state constitution that directed the legislature to establish intermediate courts of appeals. WIS. CONST. art. VII § 2 (1848) (amended 1977). The legislature reacted by enacting WIS. STAT. ANN. §§ 808.01-.11, 809.01-.85 (West Supp. 1979), which created the intermediate appellate courts and established rules of procedure.

8. 80 Wis. 2d at 100, 258 N.W.2d at 683.

9. *Id* at 104, 114, 258 N.W.2d at 685, 689-90.

10. *Id.* at 114-21, 258 N.W.2d at 690-93.

11. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297, 297 n.1 (1977). Wisconsin adopted strict products liability in 1967. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

12. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides (emphasis added):

> Special Liability of Seller of Product for Physical Harm to User or Consumer
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> (1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Of course, the elements of strict products liability differ from the elements of negligence. To establish negligence a party must prove "(1) a duty to conform to a certain standard of conduct to protect others against unreasonable risks; (2) a failure to conform to the required standard; (3) a causal connection between the conduct and the injury; and (4) actual loss or damage as a result of the injury." Thomas v. Kells, 53 Wis. 2d 141, 144, 191 N.W.2d 872, 873-74 (1971). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS § 281 (1965).

The courts have had trouble defining the defectiveness that must be present to create liability

that the product causing the plaintiff's injury was, in some way, defective. Like *Chart*, many of these cases raise the question whether evidence of subsequent remedial measures (especially changes in the design of a product) is admissible to prove that a product was defective.[13] The *Chart* court's holding that evidence of this type is admissible in strict products liability actions is likely to be relied upon by countless plaintiffs (and jeered by countless defendants) for many years to come.

This article proposes to describe and evaluate the holding and reasoning of *Chart*. Parts I and II will describe the background against which the case was decided. Specifically, Part I will discuss the theoretical basis for the conventional rule that excludes evidence of subsequent remedial measures when offered to prove negligence, and Part II will examine the leading pre-*Chart* cases, focusing on the role of this "exclusionary rule" in a strict products liability context. Part III will then discuss the holding and reasoning of the *Chart* decision in detail. Finally, Part IV will present the author's observations and suggestions concerning the use of evidence of subsequent remedial measures in products liability actions.

I. THE THEORETICAL BASES FOR THE EXCLUSIONARY RULE

At common law,[14] and under both Federal Rule of Evidence 407 and Wisconsin Rule of Evidence 904.07,[15] evidence of measures taken to

under § 402A. Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 66, 211 N.W.2d 811, 813 (1973). Defectiveness has been defined only on a case-by-case basis, and it has been noted that the term is not susceptible of an all-encompassing definition. 1 R. HURSCH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:12, at 670 (2d ed. 1970).

One definition that has been used is one by which "defectiveness" is measured by reference to "consumer expectations." *See* Note, *Strict Products Liability in Wisconsin*, 1977 WIS. L. REV. 227, 230: "[S]ection 402A, read in conjunction with the comments, clearly predicates liability upon the notion of frustration of the ordinary consumer's expectations, a concept derived substantially from the law of contracts." The consumer expectations test for § 402A defectiveness has posed many problems for the courts, however. While Wisconsin, for example, ostensibly applies the consumer expectations test, one commentator has noted that Wisconsin strict products liability law is in a state of considerable confusion as a result of the Restatement's intermingling of tort and contract notions of liability. *Id.* at 230-35.

Deans Wade and Page Keeton have independently suggested that the consumer expectations test be abandoned in favor of a test that considers whether a product was "unreasonably dangerous," which is determined by balancing the magnitude of the risk of danger posed by the product against the utility of the product. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38 (1973); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837 (1973).

13. For a general discussion of this issue, see Annot., 74 A.L.R.3d 1001 (1976).

14. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 275 (2d ed. Cleary 1972 & Supp. 1978) [hereinafter cited as MCCORMICK]; 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 283 (3d ed. 1940 & Supp. 1979) [hereinafter cited as WIGMORE].

15. FED. R. EVID. 407, entitled "Subsequent Remedial Measures," provides as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

The text of WIS. R. EVID. 904.07 is recited in note 4 *supra*. The Wisconsin Rule is substantially the same as FED. R. EVID. 407.

correct a defect or shortcoming is not admissible to prove that the defendant was negligent. The evidence may, however, be admitted for other purposes.[16]

A. *Justifications for Exclusion*

Three arguments have been made to support the exclusion of evidence of subsequent remedial measures:[17] (1) the evidence is not relevant to the issue of negligence or, at least, is not sufficiently relevant to justify its admission; (2) the admission of evidence of subsequent repairs would discourage potential defendants from taking corrective measures; and (3) notions of fair play would be offended if evidence of repair was admitted against a person who, by effecting the repair, had done exactly what society expected of him.

The first argument is premised upon the notion that evidence of remedial conduct is "equally consistent with injury by mere accident or contributory negligence" as with injury caused by the negligence of the defendant.[18] Those who subscribe to this theory argue that the evidence is not sufficiently probative to outweigh the danger of misleading, confusing, or unduly prejudicing the jury. For example, the Supreme Court of the United States has observed that

> the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create prejudice against the defendant.[19]

Justice Clark of the Supreme Court of California made a similar comment in his dissent in *Ault v. International Harvester Co.*,[20] a case that, like *Chart*, dealt with the admissibility of evidence of subsequent repairs:

> Change in a product is frequently made for reasons unrelated to the

16. *See* notes 4, 15 *supra*. *See also* section I(B) *infra*.

17. This rule is frequently referred to as the "exclusionary rule" or the "general exclusionary rule." *See, e.g.*, Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 840 [hereinafter cited as *Evidence of Subsequent Repairs*]; Comment, Ault v. International Harvester Co.—*Death Knell to the Exclusionary Rule Against Subsequent Remedial Conduct in Strict Products Liability*, 13 SAN DIEGO L. REV. 208, 209 (1975) [hereinafter cited as *Death Knell to the Exclusionary Rule*]. In light of the many purposes for which evidence of remedial measures is admissible, *see* text accompanying note 35 *infra*, the use of the term "*general* exclusionary rule" is questionable. *Evidence of Subsequent Repairs, supra* at 845. This article will, accordingly, refer to the rule as simply the "exclusionary rule."

18. FED. R. EVID. 407 (West 1975) (Advisory Committee's Notes). Baron Bramwell, in an often-quoted remark from Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. (n.s.) 261, 263 (1869), commented that the exclusionary rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before."

19. Columbia & P. S. R. R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892) (citations omitted). Commentators have made similar arguments. *See, e.g.*, G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 48, at 152 (1978); 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 164, at 241-42 (1978); WIGMORE, *supra* note 14, § 283, at 151.

20. 13 Cal. 3d 113, 125-26, 528 P.2d 1148, 1156, 117 Cal. Rptr. 812, 820 (1974) (en banc) (Clark, J., dissenting).

> remedial nature of the change. Among the motivations for change are the desire to decrease production cost or to increase efficiency or salability. The most striking illustration of lack of probative value is supplied by the automobile industry. Each year hundreds of changes are made in a new model. It is absurd to suggest that each change reflects an admission [that] the modification was made to remedy a defect.
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> Notwithstanding the lack of probative value, juries, in the heat of negligence or product liability trials—learning only of a single change—may conclude the change reflects an admission of negligence or defect and may give great and decisive weight to the perceived admission.

As some commentators have pointed out, evidence of subsequent remedial measures may be relevant[21] because negligence is a *possible* inference from the evidence.[22] Moreover, the potential for jury abuse does not support a blanket exclusion since, as Judge Weinstein has noted, rule 403[23] (and its counterparts at the state level) would provide an adequate basis for excluding evidence that is unduly prejudicial, likely to confuse the jury, or merely cumulative.[24]

The second argument for the exclusion of evidence of subsequent remedial measures has been summed up by the Supreme Court of Indiana:

> The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. . . . True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrong-doers.[25]

Commentators have criticized this argument on a number of grounds. First, they argue that there have been no empirical studies that verify the accuracy of the assertion that potential defendants would make fewer

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21. Relevancy is defined in FED. R. EVID. 401. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *See generally* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

22. *See, e.g.*, FED. R. EVID. 407 (West 1979) (Advisory Committee's Notes); MCCORMICK, *supra* note 14, § 275, at 666; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 407[02], at 407-08 to 407-09 (1979); WIGMORE, *supra* note 14, § 283, at 151.

23. FED. R. EVID. 403, entitled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time," provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

24. J. WEINSTEIN & M. BERGER, *supra* note 22, ¶ 407[03] at 407-13. *See also* Note, *The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Proving Negligence*, 27 MAINE L. REV. 225, 240 (1975) [hereinafter cited as *The Repair Rule*]; Note, *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow*, 9 U. CAL. D. L. REV. 421, 438-39 (1976) [hereinafter cited as *Repairs: Yesterday, Today, and Tomorrow*].

One could argue, however, that the exclusionary rule serves to "flag" the possibility of prejudice and confusion, and that judges and counsel would forget about the problems within a short time if the rule were abolished.

25. Terre Haute & Indianapolis R.R. v. Clem, 123 Ind. 15, 18-19, 23 N.E. 965, 966 (1890).

repairs if evidence of those repairs were admissible.[26] In addition, they point out that most potential defendants, particularly manufacturers, have a sufficient economic self-interest that they would take corrective measures to avoid unfavorable publicity and consumer backlash regardless of the admissibility of evidence of those measures.[27] The commentators have also noted that most potential defendants either do not know about the exclusionary rule[28] or, if they do, also know that there are a host of exceptions that would permit the evidence to be admitted.[29] Finally, most commentators have pointed out that the use of liability insurance is widespread,[30] and that most insurance carriers advise their clients to take remedial measures when a defect is found, even though evidence of the changes might later be used to prove liability.[31]

The third argument for exclusion of the evidence—that admission would offend fundamental notions of fair play—has been developed only recently. The analysis is straightforward: "[P]eople who take post-accident safety measures are doing exactly what good citizens should do. In these circumstances, so long as the relevancy of the activity is not great, courts do not wish to sanction procedures which appear to punish praiseworthy behavior."[32]

The "fairness" argument, as it is sometimes called, has drawn little attention from critics of the exclusionary rule. However, the argument would seem to be less persuasive when a corporate defendant is involved since the public generally is not offended if "looser" standards of fairness are applied to large corporations.

Critics have also questioned the premises on which the exclusionary rule is based. The gist of all these contentions is that the values served by exclusion—namely, preventing jury misuse, encouraging safety measures, and preserving the appearance of fairness—do not warrant withholding

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26. Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 FORUM 1, 6 (1971); *The Repair Rule*, *supra* note 24 at 242. *But see Death Knell to the Exclusionary Rule*, *supra* note 17, at 223; *and* Recent Developments, 1975 U. ILL. L.F. 288, 291-92.

27. *See, e.g.*, Field, *The Maine Rules of Evidence: What They Are and How They Got That Way*, 27 MAINE L. REV. 203, 218 (1975); *Evidence of Subsequent Repairs*, *supra* note 17, at 849. *But see* Recent Developments, 1975 U. ILL. L.F. 288, 291-92.

28. D. LOUISELL & C. MUELLER, *supra* note 19, § 164, at 240; Schwartz, *supra* note 26, at 6; J. WEINSTEIN & M. BERGER, *supra* note 24, ¶ 407[02], at 407-10.

29. D. LOUISELL & C. MUELLER, *supra* note 19, § 164, at 240; S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 164 (2d ed. 1977); J. WEINSTEIN & M. BERGER, *supra* note 22, ¶ 407[02], at 407-10; *Repairs: Yesterday, Today, and Tomorrow*, *supra* note 24, at 424 n.29.

30. S. SALTZBURG & K. REDDEN, *supra* note 29, at 168; *Repairs: Yesterday, Today, and Tomorrow*, *supra* note 24, at 433-34.

31. *Id.* at 434; Davis, *Evidence of Post-Accident Failures, Modifications and Design Changes in Products Liability Litigation*, 6 ST. MARY'S L.J. 792, 798 (1975). *But see* S. SALTZBURG & K. REDDEN, *supra* note 29, at 168-69.

32. S. SALTZBURG & K. REDDEN, *supra* note 29, at 164. *See also* D. LOUISELL & C. MUELLER, *supra* note 19, § 163, at 236, § 164, at 241; *Death Knell to the Exclusionary Rule*, *supra* note 17, at 223 n.68.

relevant evidence from the trier of fact[33] or increasing the difficulty of establishing a case.[34]

B. *Exceptions to the Exclusionary Rule*

The exclusionary rule is riddled with exceptions,[35] as Professor McCormick has pointed out:

> [E]vidence of subsequent repair or changes has been admitted as evidence of the defendant's ownership or control of the premises or his duty to repair where these are disputed; *as evidence of the possibility or feasibility of preventive measures, when properly in issue*; as evidence, where the jury has taken a view, or where the defendant has introduced a photograph of the scene, to explain that the situation at the time of the accident was different; as evidence of what was done later to show that the earlier condition as of the time of the accident was as plaintiff claims, if the defendant disputes this; as evidence that the faulty condition, later remedied, was the cause of the injury by showing that after change the injurious effect disappeared; and, as evidence contradicting facts testified to by the adversary's witness.[36]

Wisconsin Rule of Evidence 904.07 codifies many of these exceptions.[37]

Although any number of exceptions may be important in a products liability action, only one, the "feasibility" exception, was raised in *Chart*.[38] The admission of evidence of subsequent repairs to prove feasibility has traditionally been justified on two grounds. First, as Professors Louisell and Mueller have pointed out, evidence of subsequent remedial measures "has its highest and clearest probative value [when offered to prove feasibility], and there is some virtue in a rule which admits proof in such circumstances while focusing the attention of the trier of fact upon its specific utility."[39] Second, the proponents of the feasibility exception argue that it would be unfair to preclude a plaintiff from showing that the measures were later taken when the defendant has contended that all possible care was exercised or that there were no alternatives available.[40]

These arguments are clearly problematic. The first argument may

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33. *Evidence of Subsequent Repairs*, *supra* note 17, at 846; *The Repair Rule*, *supra* note 24, at 242.

34. *Evidence of Subsequent Repairs*, *supra* note 17, at 848; Recent Cases, 44 U. CINN. L. REV. 637, 641 (1975).

35. Actually, these "exceptions" are not exceptions at all, but instances of other probanda for which evidence of subsequent remedial measures is admissible. These instances have traditionally been referred to as "exceptions," *see, e.g.*, *Evidence of Subsequent Repairs*, *supra* note 17, at 841, and this article will adhere to the practice.

36. MCCORMICK, *supra* note 14, § 275, at 667-68 (footnotes omitted) (emphasis added).

37. The text of WIS. R. EVID. 904.07 is recited in note 4 *supra*.

38. *See* Part III *infra*.

39. D. LOUISELL & C. MUELLER, *supra* note 19, § 165, at 251. *See* Falknor, *Extrinsic Policies Effecting Admissibility*, 10 RUTGERS L. REV. 574, 591 (1956); *Evidence of Subsequent Repairs*, *supra* note 17, at 842 n.23. Evidence of feasibility is relevant to prove negligence since, in determining whether the defendant exercised reasonable care, "[c]onsideration must also be given to any alternative course open to the actor." PROSSER, *supra* note 12, § 31, at 148.

40. J.WEINSTEIN & M. BERGER, *supra* note 22, ¶ 407[03], at 407-15.

temper the fear that evidence of subsequent repairs tends to unduly prejudice the jury, but it does not refute the contention that admission of such evidence will deter corrective measures, nor does it address the argument that use of the evidence is inherently unfair. The second argument is equally problematic since the question of fairness is, at best, a draw. While it may be unfair to prevent the plaintiff from introducing evidence of subsequent repairs to contest the feasibility of a modification, it would seem to be equally unfair, given the inflammatory nature of the evidence, to allow it to be used against the defendant. Moreover, the admission of the evidence, even for a limited purpose, tends to defeat the nondeterence policy of the exclusionary rule: "Is it not true that to allow exceptions to a policy of absolute exclusion is to destroy the policy itself?"[41] Finally, the possibility that a jury will give evidence of subsequent repairs more weight than is warranted, even if a cautionary instruction is given, exists even when the evidence is introduced for a limited purpose rather than to prove negligence or culpable conduct.

Commentators have noted that the feasibility and other exceptions to the exclusionary rule provide skillful counsel with an opportunity to take advantage of his opponent through "subtle trial maneuvers" designed to circumvent the rule.[42] The commentators have also argued that admission of evidence for a limited purpose unnecessarily confuses the jury,[43] and that a rule with numerous exceptions, like the exclusionary rule, makes it difficult for attorneys to advise clients or plan trial strategy.[44]

In short, while there is no dearth of scholarly speculation regarding the merits of the exclusionary rule, the theories concerning the rule are just that—speculation. In the absence of empirical data on which to base observations and conclusions, all justifications for the rule are theoretical and remain subject to debate.

II. THE ROLE OF THE EXCLUSIONARY RULE IN A STRICT PRODUCTS LIABILIBY CONTEXT: PRE-*Chart* CASES

Until recently, courts applied the exclusionary rule to strict products liability actions as well as negligence actions with little question. For example, in *Price v. Buckingham Manufacturing Co.*[45] the Supreme Court of New Jersey held that evidence of a modification in the design of a seat belt was not admissible to prove that the belt was legally defective. The

41. Trautman, *supra* note 21, at 412.

42. *See, e.g.*, D. LOUISELL & C. MUELLER, *supra* note 19, § 163, at 235-36, § 166, at 255; Slough, *Relevancy Unraveled—Part III: Remote and Prejudicial Evidence*, 5 KAN. L. REV. 675, 709 (1957).

43. *Repairs: Yesterday, Today, and Tomorrow*, *supra* note 24, at 426, 438. When evidence is admitted for a limited purpose, the party against whom the evidence is admitted is entitled to a cautionary instruction. WIS. STAT. ANN. § 901.06 (West 1975); FED. R. EVID. 105.

44. *Repairs: Yesterday, Today, and Tomorrow*, *supra* note 24, at 438.

45. 110 N.J. Super. 462, 266 A.2d 140 (1970).

court, in a brief opinion, stated that rule 51 of the New Jersey Rules of Evidence[46] applied with equal force to strict products liability and negligence actions,[47] presumably on the ground that admission of the evidence would deter product improvements.[48]

An Ohio appellate court has taken the same position, but has embellished it with a significant exception:

> In an action based upon strict liability in tort, evidence of subsequent changes and changes in the "state of the art" are not admissible to show that the item is defective. However, such evidence is admissible for the limited purpose of showing that an alternative design was feasible at the time that the item was manufactured or sold.[49]

This rule is, of course, similar to the rule typically applied in negligence actions.[50]

While these and similar cases still represent the state of the law in many jurisdictions, the number of courts[51] and commentators[52] who favor the general admission of evidence of subsequent remedial measures aimed at proving the defectiveness of a product in strict products liability actions is growing. The leading pre-*Chart* case supporting general admissibility—and still a landmark decision in this area—is *Ault v. International Harvester Co.*,[53] a decision of the Supreme Court of California. In *Ault*,

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46. N.J. R. EVID. 51 provides:
> When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

47. 110 N.J. Super. at 464-65, 266 A.2d at 141. *See also* Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (diversity case applying New York law); Phillips v. J.L. Hudson Co., 79 Mich. App. 425, 263 N.W.2d 3 (1977); *cf.* Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 573 P.2d 785 (1978) (en banc) (stating that, generally, evidence of subsequent repairs is inadmissible, but recognizing that such evidence may be admitted to prove feasibility).

48. This is the conclusion reached by Professor Schwartz in his article, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, *supra* note 26, at 4 n.20.

49. La Monica v. Outboard Marine Corp., 48 Ohio App. 2d 43, 44-45, 355 N.E.2d 533, 535 (1976) (citation omitted). Other courts have adopted a similar rule. *See, e.g.*, the frequently cited Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972).

50. *See* Part I *supra*.

51. *See, e.g.*, Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977); Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974) (en banc); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970). *See also* Barry v. Manglass, 55 A.D.2d 1, 389 N.Y.S.2d 870 (1976). *But see* Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (diversity case applying N.Y. law); Phillips v. J.L. Hudson Co., 79 Mich. App. 425, 263 N.W.2d 3 (1977); Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 573 P.2d 785 (1978).

52. *See, e.g.*, Davis, *Evidence of Post-Accident Failures, Modifications and Design Changes in Products Liability Litigation*, 6 ST. MARY'S L.J. 792 (1975); Lloyd, *Admissibility of Evidence of Post-Accident Repairs: The Graying of a Black Letter Rule*, 25 DRAKE L. REV. 400 (1975); Schwartz, *supra* note 26; *Evidence of Subsequent Repairs*, *supra* note 17; Note, *Repairs; Yesterday, Today, and Tomorrow*, *supra* note 24. *See also* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 12.04 (1978); G. LILLY, *supra* note 19, at § 48; D. LOUISELL & C. MUELLER, *supra* note 19, at § 164; S. SALTZBURG & K. REDDEN, *supra* note 29. *But see Death Knell to the Exclusionary Rule*, *supra* note 17; Recent Developments, 1975 U. ILL. L.F. 288.

53. 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974) (en banc).

plaintiff, who had been seriously injured in an automobile accident, brought an action against the manufacturer of the auto in which he was riding, claiming negligence, defective design, and breach of warranty.[54] At trial, plaintiff attempted to prove that the vehicle was legally defective by showing that the defendant-manufacturer, International Harvester, had changed the design of its steering boxes (the part in question) three years after the accident.[55] The evidence was admitted,[56] and, after an unfavorable verdict, International Harvester appealed, contending that the evidence was not admissible under section 1151 of the California Evidence Code.[57]

The supreme court disagreed with defendant's contention and held that the statute did not apply to strict products liability actions since proof of "negligence or culpable conduct," the issues enumerated in the statute, was not required.[58] The court also pointed out that the policy justifications for the exclusionary rule were inapplicable in the products liability area because the manufacturer is motivated by economic self-interest to make the product safer.[59]

The *Ault* case is important because it contains an extensive analysis of the policy considerations behind the exclusionary rule[60] and because it is frequently cited by other courts as precedent.[61] Justice Mosk, writing for the majority, concluded that section 1151 on its face did not apply to strict products liability actions since neither negligence nor culpability is an element of strict liability.[62] In reaching this conclusion, Mosk, apparently attempting to deal with any argument that might seek to exploit the term "negligence," noted that "in the [strict] products liability field 'policy considerations are involved which shift the emphasis from the manufacturer's conduct to the character of the products. . . .' "[63] Mosk

54. *Id.* at 116, 528 P.2d at 1149, 117 Cal. Rptr. at 813.

55. *Id.* at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

56. *Id.*

57. CAL. EVID. CODE § 1151 (West 1966) provides: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event."

58. 13 Cal. 3d at 117-18, 528 P.2d at 1150-51, 117 Cal. Rptr. at 814-15. Note that the California rule, like the Wisconsin, New Jersey, and federal rules, bars admission of evidence of subsequent remedial conduct to prove "culpable conduct" as well as negligence.

59. *Id.* at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.

60. *See also* Schuldies v. Service Mach. Co., 448 F. Supp. 1196 (E.D. Wis. 1978); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970).

61. A partial listing of these cases is in note 51 *supra*. Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 573 P.2d 785 (1978) (en banc), deserves special attention since, in that case, the Washington Supreme Court held that evidence of subsequent repairs was not admissible to prove that a product was defective. *Id.* at 483-84, 573 P.2d at 790-91. Although the court agreed that the nondeterrence argument lacked support in the products liability area, it nevertheless sustained the decision of the trial court on the grounds that the potential for jury misuse was simply too great. *Id.* The court reserved judgment on whether a trial court should be given discretion to admit the evidence. *Id.* at 484, 573 P.2d at 791.

62. 13 Cal. 3d at 118, 528 P.2d at 1150-51, 117 Cal. Rptr. at 814-15.

63. *Id.* at 121, 528 P.2d at 1152, 117 Cal. Rptr. at 816 (citing Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972))

specifically rejected International Harvester's argument that the "culpable conduct" language of the rule was broad enough to encompass strict products liability, explaining, in a conclusory fashion, that culpability implies blameworthiness and that strict products liability is premised upon the idea of liability without fault.[64] He also pointed out that the legislative history of section 1151 indicated that the drafters had not intended the statute to apply to actions based upon strict products liability.[65] Instead, he said, the section was "intended merely to codify 'well-settled law,' " which dealt only with the admissibility of evidence of subsequent remedial measures in negligence actions.[66]

Mosk then turned to an examination of the policy justifications for excluding evidence of subsequent repairs, finding that the legislature intended to "avoid deterring individuals from making improvements or repairs after an accident has occurred."[67] He concluded that this factor did not play a comparable role in the products liability area:

> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.[68]

Mosk also noted that manufacturers of mass-produced goods would be *encouraged* to market safer products if evidence of subsequent repairs were admissible since the exclusionary rule would not shield them from liability. In short, the majority concluded that it is in a mass producer's own interest to improve defectively designed products; the exclusionary rule neither prods the manufacturer into improving his product nor deters him from doing so.

Justice Clark dissented. He argued that the term "culpable conduct" includes any breach of a legal duty, and that a manufacturer acts "culpably" when he places a defective product in the stream of commerce.[69] Clark went on to add that the policy underlying the exclusionary rule is "as applicable to products liability [*i.e.*, strict products liability] actions as to negligence actions,"[70] but pointed out that, in his opinion, the primary purpose of the exclusionary rule was to prevent the jury from giving evidence of subsequent repairs unwarranted weight.[71] Clark reasoned that

64. *Id.* at 118, 528 P.2d at 1150-51, 117 Cal. Rptr. at 814-15.
65. *Id.* at 118, 528 P.2d at 1151, 117 Cal. Rptr. at 815.
66. *Id.* at 118-19, 528 P.2d at 1151, 117 Cal. Rptr. at 815.
67. *Id.* at 119, 528 P.2d at 1151, 117 Cal. Rptr. at 815.
68. *Id.* at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.
69. *Id.* at 124, 528 P.2d at 1154-55, 117 Cal. Rptr. at 818-19 (Clark, J., dissenting).
70. *Id.* at 124, 528 P.2d at 1155, 117 Cal. Rptr. at 819.
71. *Id.* at 125, 528 P.2d at 1155, 117 Cal. Rptr. at 819.

a jury was just as likely to misuse the information in a strict products liability action as in an action sounding in negligence:

> [C]hange in a product is frequently made for reasons unrelated to the remedial nature of the change. . . .
>
> Notwithstanding the lack of probative value, juries, in the heat of negligence or products liability trials—learning only of a single change—may conclude the change reflects an admission of negligence or defect and give great and decisive weight to the perceived admission.[72]

Clark concluded that the exclusionary rule should therefore apply in strict products liability cases.[73]

Justice Clark went on to note that the exclusionary rule alone would not solve the problem of jury misuse of evidence since a jury could still learn of remedial repairs under one of the exceptions to the rule.[74] To alleviate this problem, he suggested that trial judges apply a three-pronged test in determining whether to admit evidence of subsequent remedial measures under one or more of the exceptions to the exclusionary rule:

> [T]he party introducing the evidence must persuasively satisfy the trial court that the "issue on which it is offered is of substantial importance and is actually, not merely formally in dispute, that the plaintiff cannot establish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse."[75]

III. *Chart*: A Description and Evaluation of Its Holding and Reasoning

A. *Description*

In *Chart*, the Wisconsin Supreme Court affirmed the trial court's ruling that evidence of design changes in the 1964 and 1965 model Corvairs was admissible against General Motors. Beyond this, however, it is difficult to determine the extent or exact nature of the court's holding. The majority opinion, written by Justice Day, pointed out that the case raised an issue of first impression in Wisconsin,[76] but did not say exactly what the issue was. Moreover, it is not possible to infer a clear statement of the issue from the result since the majority did not concisely state its holding.

At least two interpretations of the opinion are possible. On the one hand, the majority may have concluded that the exclusionary rule embodied in Wisconsin Rule 904.07 is not applicable to strict products liability actions. On the other hand, it is at least equally plausible to read the majority opinion to hold that the exclusionary rule does apply, but the evidence of the change in the design of the Corvair was admissible under the feasibility exception.

72. *Id.* at 125-26, 528 P.2d at 1156, 117 Cal. Rptr. at 820.

73. *Id.*

74. *Id.* at 126, 528 P.2d at 1156, 117 Cal. Rptr. at 820.

75. *Id.* at 127, 528 P.2d at 1156, 117 Cal. Rptr. at 820 (footnote and citations omitted).

76. 80 Wis. 2d at 100, 258 N.W.2d at 683.

Several arguments can be made in support of the first interpretation. First, the majority discussed only the single policy it perceived as underlying the exclusionary rule;[77] it did not consider the justifications for the feasibility exception or any other exception.[78] Second, the majority ignored the argument—made by both General Motors[79] and the dissenting opinion[80]—that the feasibility exception comes into play only when the feasibility of an alternative measure is controverted.[81] Both of these factors suggest that the majority was not focusing on the feasibility exception—that it simply decided that the exclusionary rule did not apply and that evidence of subsequent repairs is generally admissible in strict products liability actions.

Nonetheless, the second interpretation of the opinion seems to be the more plausible. In concluding that the case presented a question of first impression, the majority quoted a portion of the Judicial Council Committee's Note to Rule 904.07: "The rule does not attempt to make the determination whether remedial measures in product design are admissible as 'feasibility of a precautionary measure' to prove that the product was defective. The authorities are in conflict."[82] The language of this comment rather clearly indicates that Rule 904.07 *does* apply to strict products liability cases, although the feasibility exception may, at the same time, carve out an exception. Thus, the majority probably held that evidence of the design change made in the Corvair was excluded by the exclusionary rule embodied in Rule 904.07 but admissible under the feasibility exception.[83] At the same time, given the tenor of the majority opinion, it seems clear that the feasibility exception, as interpreted by the court, is broad enough to permit admission of evidence of subsequent modifications in *any* case, not just under the peculiar facts of *Chart*.

The majority's reasoning in support of its conclusion (whatever that may have been) was cursory and cryptic:

> Authorities are divided on the question whether evidence of subsequent remedial changes is admissible in a products liability case such as this. We are persuaded that such evidence is admissible. Evidence of subsequent remedial measures is not without probative value. In the well-reasoned and persuasive opinion of *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974), the California Supreme Court stated, "if the changes occur closely in time they may well illustrate the feasibility of the

77. *Id.* at 101-02, 258 N.W.2d at 683-84.

78. One could argue, however, that it was unnecessary for the court to consider the policy justifications for the feasibility exception in light of its determination that the policies behind the exclusionary rule would not be offended by admission of evidence of subsequent modifications in strict liability actions. *See* text accompanying notes 84-89 *infra*.

79. Brief for Appellant at 31-33.

80. 80 Wis. 2d at 120, 258 N.W.2d at 692 (Hansen, J., dissenting).

81. *See* text accompanying notes 39-40 *supra*.

82. 80 Wis. 2d at 100, 258 N.W.2d at 683 (citation omitted).

83. The interpretation is also supported by the dissent's reading of the majority opinion. *See id.* at 120, 258 N.W.2d at 692 (Hansen, J., dissenting).

improvement at the time of the accident, one of the normal elements of the negligence calculus."[84]

The majority went on to conclude that this analysis also applies in actions that sound in strict products liability, arguing that admission of the evidence would pose little threat to the policy behind the exclusionary rule since (1) "in the products liability area, 'policy considerations are involved which shift the emphasis from the defendant manufacturers' conduct to the character of the product' "[85] and (2) the conduct of manufacturers of mass-produced products is not guided by the evidentiary rule.[86] The court's argument on the latter point was bolstered by a reference to *Ault v. International Harvester*,[87] in which the court had pointed out that "[i]n the products liability area, the exclusionary rule . . . does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability."[88] The majority concluded by noting that "[e]conomic realities will set the course [of conduct of a manufacturer of mass-produced goods] and these realities are that the sooner remedial measures are taken, the less costly the defect will be to the manufacturer."[89]

Justice Connor Hansen wrote the dissent. He first pointed out that evidence of design changes is admissible under the feasibility exception only when the feasibility of an alternative design is contested, which General Motors had not done.[90] Justice Hansen then turned to the majority's argument that the additional liability created by continuing production of a defective product would force manufacturers to adopt changes that make their products safer.[91] He argued that admissibility will tend to decrease the number of remedial measures taken because "by making changes, [the manufacturer] increases the probability that he will be held liable for injuries caused by those products already on the market."[92] Hansen also criticized the majority for resting its decision on *Ault*, pointing out that the case was not relevant since California, unlike Wisconsin, had liberalized the burden of proving that a product was defective.[93] He argued that, in Wisconsin, design modifications may be determinative of whether an "unreasonable danger" existed (a crucial

84. *Id.* at 100, 258 N.W.2d at 683.

85. 80 Wis. 2d at 101, 258 N.W.2d at 683-84, *quoting* Ault v. International Harvester Co., 13 Cal.3d 113, 121, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974).

86. *Id.* at 101-02, 258 N.W.2d at 684.

87. 13 Cal. 3d 113, 120, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974).

88. 80 Wis. 2d at 101, 258 N.W.2d at 684, *quoting* Ault v. International Harvester Co., 13 Cal. 3d 113, 121, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 816 (1974) (citation omitted).

89. *Id.* at 102, 258 N.W.2d at 684.

90. *Id.* at 120, 258 N.W.2d at 692.

91. *Id.* at 120-21, 258 N.W.2d at 693. The majority's arguments are summarized in the text accompanying notes 85-89 *supra*.

92. 80 Wis. 2d at 121, 258 N.W.2d at 693.

93. *Id.* At least one commentator has suggested that the test applied in California was essentially no different from that used in any other state. *See* Wade, *supra* note 12, at 830.

question), and can, therefore, be the difference between liability and no liability.[94] Thus, he concluded, "[t]he deterrent effect of admissibility may . . . be substantial."[95]

B. *Evaluation*

1. *The Reasoning of the Decision*

The *Chart* decision is troubling in a number of respects. The ambiguity of the majority's opinion is, of course, the shortcoming that is likely to cause the most immediate concern, and the court will undoubtedly be called upon to clarify its holding. But, even aside from this problem, the majority's opinion is problematic in several important respects.

If the court held that the exclusionary rule was not applicable in strict products liability actions—rather than that evidence of subsequent repairs is admissible under the feasibility exception—its decision stands on tenuous grounds. As was noted above,[96] the Judicial Council Committee's comments to Wisconsin Rule 904.07 clearly suggest that the exclusionary rule applies to strict products liability actions as well as negligence actions. Moreover, the "negligence" and "culpable conduct" language embodied in Rule 904.07 is broad enough to encompass strict products liability. The theory underlying strict products liability is very similar to that behind negligence;[97] in fact, the Supreme Court of Wisconsin has observed that strict products liability is basically negligence per se.[98] Similarly, as Justice Clark observed in *Ault*,[99] the phrase "culpable conduct" is broad enough to cover any event that gives rise to liability.

The majority's determination that evidence of subsequent repairs is relevant[100] is also problematic. The most pressing question—one that almost leaps at the reader—is: "Relevant to prove what?" The court does not specify whether the evidence is relevant to proof of a defect in the product or whether it is relevant only to prove the feasibility of an alternative measure. The court's failure to indicate which alternative it was adopting was, of course, tied to the lack of a clear statement of the issue. Nonetheless, the determination that evidence of subsequent remedial measures is relevant to proof of a defect is a significant departure from the traditional thinking that the evidence has either no probative value or insufficient probative value to warrant admission.[101]

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94. 80 Wis. 2d at 121, 258 N.W.2d at 693.

95. *Id.*

96. *See* text accompanying notes 82-83 *supra.*

97. *See* text accompanying notes 107-13 *infra.*

98. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *See also* Greiten v. LaDow, 70 Wis. 2d 589, 595, 235 N.W.2d 677, 681-82 (1975); Howes v. Hansen, 56 Wis. 2d 247, 259, 201 N.W.2d 825, 831 (1972). Professor Twerski has severely criticized the court for using a negligence per se concept in evaluating strict liability matters. Twerski, *supra* note 11, at 319-31.

99. *See* text accompanying note 69 *supra.*

100. 80 Wis. 2d at 100, 258 N.W.2d at 683.

101. *See* text accompanying notes 18-20 *supra.* The majority's conclusion about the relevancy of

Perhaps the most troubling aspect of the opinion is the majority's policy discussion. The court acknowledged only one of the three policy justifications commonly advanced to support the exclusionary rule, the nondeterrence policy,[102] choosing to ignore both the jury misuse[103] and fundamental fairness[104] arguments. Moreover, the reasoning advanced by the majority to support its conclusion that admission of the evidence would not deter improvements is questionable at best.

The court attempted to justify its reasoning by distinguishing between products liability actions based upon strict liability and those based on other theories, arguing that "in the strict products liability area, 'policy considerations are involved which shift the emphasis from the defendant manufacturers' conduct to the character of the product.' "[105] This argument is unpersuasive. As Dean Wade has pointed out:

> It has been suggested that [the conventional section 402A test for imposing strict products liability] amounts to characterizing the product rather than the defendant's conduct. This is quite true, but it is easy to phrase the issue in terms of conduct. Thus, assuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing the product on the market? This, it would seem, is another way of posing the question of whether the product is reasonably safe or not. And it may well be the most useful way of presenting it.[106]

Professor Dickerson, writing on the 1961 draft of section 402A of the Restatement (Second) of Torts, also observed:

> It is, indeed, a gross exaggeration to put at opposite poles what represent only modest differences in degree. On the one hand, even liability for negligence is a kind of strict liability so far as it holds a person to a general standard of conduct without regard to his peculiar idiosyncrasies. On the other hand,

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safety measures to feasibility and defectiveness would certainly be tenable if Wisconsin followed the "risk/utility balancing" test of defectiveness that has been proposed by Deans Wade and Page Keeton. *See* note 22 *supra*. Under the risk/utility balancing test, the feasibility of a precautionary measure is one factor that the trier of fact must consider in making a determination whether a product is defective. *Id.* But exactly how evidence of a precautionary measure is relevant to determine the defectiveness of a product under the consumer expectations test, to which Wisconsin apparently adheres, *see* Note, *Strict Products Liability in Wisconsin*, 1977 WIS. L. REV. 230, 235, remains a mystery.

102. *See* text accompanying notes 25-31 *supra*.

103. *See* text accompanying notes 18-24 *supra*. Counsel for General Motors raised the jury misuse argument in its briefs, Brief for Appellant at 29; Reply Brief for Appellant at 8, but neither the majority nor the dissent discussed the matter. It deserved at least a brief discussion since Justice Clark based his dissent in *Ault v. International Harvester Co.* primarily on this point, *see* text accompanying notes 70-72 *supra*, and the Supreme Court of Washington upheld the exclusion of the evidence for the same reason. Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 483, 573 P.2d 785, 791 (1978).

It is likely, however, that the majority would not have changed its holding even if it had considered the jury misuse argument. The majority might have plausibly argued that this problem could be effectively dealt with under rule 904.03, which provides a basis for excluding evidence when it presents too great a danger of unfairly prejudicing, confusing, or misleading the jury. Judge Weinstein, in discussing the exclusionary rule in the context of negligence actions, has suggested this course of action. *See* J. WEINSTEIN & M. BERGER, *supra* note 22, ¶ 407[02], at 407-11.

104. *See* text accompanying notes 32-34 *supra*.

105. 80 Wis. 2d at 101, 258 N.W.2d at 684, *quoting* Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 218 N.E.2d 749 (1972). This argument seems to have originated in *Sutkowski*.

106. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965) (footnotes omitted).

> strict liability, despite its name, also deals with the defendant's conduct and differs only in that it substitutes what has been called in other contexts a "performance standard" for a standard that deals with specific conduct. In short, this kind of strict liability differs from negligence only in eliminating the necessity of proving specific acts of negligence.[107]

The majority's "shift-in-emphasis" argument can be read as suggesting that strict products liability is fundamentally different from negligence, but this theory is also problematic. As the above-quoted comments of Dean Wade and Professor Dickerson indicate, strict products liability and negligence are actually quite similar.[108] Commentators have pointed out,[109] and the Supreme Court of Wisconsin has agreed,[110] that strict products liability is akin to negligence per se. In addition, the tests for negligence and for strict products liability are not[111] (or should not be)[112] significantly different, and the types and problems of proof under the two theories are substantially the same.[113] Moreover, the court does not explain how refocusing the jury's attention on the product (rather than on the manufacturer's conduct) will make a difference in the way manufacturers approach the decision of whether to implement an improved design. Arguably, manufacturers will still consider any modification to be an admission of fault, and react accordingly.

The majority also attempted to justify its conclusion by distinguishing between mass producers of goods and other producers.[114] Relying on the

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107. Dickerson, *The Basis of Strict Products Liability*, 17 BUS. LAW. 157, 165-66 (1961). *See also* Recent Developments, 44 U. CINN. L. REV. 637, 640 (1975).

108. *See* Rheingold, *Proof of Defect in Products Liability Cases*, 38 TENN. L. REV. 325, 325-26, 326 n.5 (1971); *cf.* Note, *The Coming of Age of Strict Products Liability in Ohio*, 39 OHIO ST. L.J. 586, 618 (1978) [hereinafter cited as *Strict Products Liability in Ohio*].

109. *See, e.g.*, Wade, *supra* note 106, at 14; Recent Cases, 44 U. CINN. L. REV. 637, 639-40 (1975). *But see* Twerski, *supra* note 11, at 319-21.

110. *See* Greiten v. LaDow, 70 Wis. 2d 589, 595, 235 N.W.2d 677, 681 (1975); Howes v. Hansen, 56 Wis. 2d 247, 259, 201 N.W.2d 825, 831 (1972); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

111. *See* Dickerson, supra note 107, at 165-66; Phelan & Foer, *Problems of Proof in Defective Design Litigation*, 54 CHI. B. REC. 257, 263 (1973); Rheingold, *supra* note 108; Wade, *supra* note 106, at 13-15; *cf.* 1 R. HURSCH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:12, at 671 (2d ed. 1974) ("a product is defective if it fails to meet the reasonable expectations of the user."); Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 305 (1967) (factors defining legal defectiveness "are closely identified with the normal, reasonable expectation patterns of buyers and sellers"). *But see* Ault v. International Harvester Co., 13 Cal. 3d at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814 n.2; Greiten v. LaDow, 70 Wis. 2d at 603-04, 235 N.W.2d at 685-86 (Heffernan, J., concurring).

112. *See, e.g.*, Keeton, *supra* note 12, at 37-38 ("A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed.") (emphasis in original); Wade, *supra* note 12. *See also Strict Products Liability in Ohio, supra* note 108, at 613-19; Note, *Strict Products Liability in Wisconsin*, 1977 WIS. L. REV. 227, 243-45.

113. Recent Developments, 50 N.C.L. REV. 417, 424 (1972); Dickerson, *supra* note 107, at 166; Rheingold, *supra* note 108; *cf. Death Knell to the Exclusionary Rule, supra* note 17, at 226. *But see* G. LILLY, *supra* note 19, § 48, at 152; *Evidence of Subsequent Repairs, supra* note 17, at 845-46.

114. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1389 (1966) (emphasis in original) defines "mass produce" as "to produce or manufacture in quantity; *esp.*: to produce considerable

reasoning of *Ault*, the majority concluded that the admission of evidence of subsequent repairs would not prevent mass producers from making changes in their products since the manufacturer of mass-produced goods is guided by the " 'economic realities . . . that the sooner remedial measures are taken, the less costly the defect will be. . . .' "[115] In attempting to defuse the argument that even mass producers might refrain from implementing corrective measures because their motivation might be misinterpreted, the court asserted that a manufacturer would not " 'forego making improvements in its product and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.' "[116]

It is difficult to say whether the assertion is correct. The court did not cite any empirical studies in support of the assertion, nor did it indicate how it arrived at the conclusion that admission of evidence of subsequent repairs would not deter manufacturers from making safety-related changes. As a general rule, however, judgments concerning matters of this type are better left to the legislature, which is able to assemble the data necessary for making an informed decision.[117]

Three points should be made, however, in defense of the majority's position. First, most commentators have argued—again without empirical support—that the factual assumptions on which the nondeterrence argument is based are incorrect.[118] Second, the court is not alone in drawing a distinction between mass producers and other producers; numerous commentators have argued that there is a difference.[119] Finally,

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quantities of standardized commodities with the use of machine techniques—opposed to *tailor make*." The terms of RESTATEMENT (SECOND) OF TORTS § 402A (1965) do not require that the defendant be a mass producer, however. Instead, § 402A requires only that the defendant be "engaged in the business of selling . . . a product [of the type that caused the injury]." Thus, it is not difficult to conceive of a situation in which the defendant is liable under § 402A but is not a mass producer—for example, a company that builds custom-designed automobiles. The applicability of *Chart* to situations of this type is unclear. *See* text accompanying notes 127-28 *infra*.

115. 80 Wis. 2d at 102, 258 N.W.2d at 684.

116. 80 Wis. 2d at 101, 258 N.W.2d at 684, *quoting* Ault v. International Harvester Co., 13 Cal. 3d 113, 120, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 816 (1974). In its Brief in Support of Motion for Rehearing, General Motors pointed out that the California Citizens Commission on Tort Reform had stated that "it is our view that permitting the admission of evidence showing design changes [occurring] subsequent to a product-related injury is quite likely, over the full range of cases, to impede rather than promote progress toward safer and more reliable products." Appellant's Brief in Support of Motion for Rehearing at 1, *citing* CALIFORNIA CITIZENS COMMITTEE ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 165 (Sept. 1977). The Court of Appeals for the Second Circuit also has observed that "[s]ome manufacturers might still decide that the risk of increased liability arising from the admission of subsequent repairs or warnings would so outweigh the risks posed by adherence to the status quo that they would opt for the latter." Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975).

117. *See* Recent Developments, 1975 U. ILL. L.F. 288, 292.

118. *See* text accompanying notes 26-31 *supra*.

119. S. SALTZBURG & K. REDDEN, *supra* note 29, at 164-65; Davis, *supra* note 52, at 798-99; Lloyd, *supra* note 52, at 409-10; *Evidence of Subsequent Repairs*, *supra* note 17, at 848-50; Recent Developments, 44 U. CINN. L. REV. 637, 641 (1975). *But see Death Knell to the Exclusionary Rule*, *supra* note 17, at 223-24; Recent Developments, 1975 U. ILL. L.F. 288, 292.

in Wisconsin the supreme court is specifically empowered by statute to amend the Rules of Evidence,[120] and this power implies that the court, as well as the legislature, is capable of making policy-oriented judgments in this area.

If, as is possible,[121] the majority's opinion was based on the feasibility exception, there is one other glaring omission in the court's discussion: the absence of any consideration of the policy justifications that underlie the feasibility exception. Of course, one could argue that if the court relied upon the feasibility exception, it also meant to hold that feasibility was *always* at issue in products liability actions based on strict liability.[122] This interpretation would be consistent with the court's broad policy analysis. However, if that was indeed what the court intended (which is likely),[123] it was a round-about, overly complex means of arriving at a result that could have been reached just as easily by excepting strict products liability actions from the scope of the exclusionary rule. Given the court's power to amend the Rules of Evidence[124] and the problematic arguments for and effects of the feasibility exception,[125] this course of action would clearly have been preferable.[126]

2. *Limitations on Admission*

As was noted above, the majority rationalized the admission of evidence of subsequent repairs by drawing a distinction between strict products liability and negligence actions and between mass producers and other producers.[127] The majority did not, however, indicate whether either (or both) of these distinctions established limits on the admission of evidence of remedial conduct. Accordingly, three interpretations of *Chart* are possible: (1) the evidence is admissible only when the action is brought against a mass-producer on a strict products liability theory; (2) the evidence is admissible only when the action is brought on a strict products liability theory, regardless of whether the defendant is a mass producer; or (3) the evidence is admissible when the action is brought against a mass producer, regardless of the theory of recovery. Thus, the stage is set for a battle over the scope of the opinion. Moreover, since the majority opinion did not address the extent to which evidence of subsequent repairs can be

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120. *See* note 4 *supra*.

121. *See* text accompanying notes 77-83 *supra*.

122. *See id.*

123. *See* text following note 83 *supra*.

124. *See* note 4 *supra*.

125. *See* text accompanying notes 41-44 *supra*.

126. One could argue that the court retained the exclusionary rule and relied on the feasibility exception because it hoped trial courts would be more careful in considering whether to admit evidence under an exception to a broad, general rule of exclusion. However, it is questionable if this consideration warrants the confusion created by such an approach.

127. *See* text accompanying notes 105-17 *supra*.

excluded under Wisconsin Rule of Evidence 904.03,[128] it is likely that the court will be called upon to establish some standards in this area.

IV. Observations and Recommendations

The decision to admit or exclude evidence of subsequent remedial measures in a products liability action turns on a balancing of two sets of competing values. One side of the analysis focuses on the values ostensibly promoted by the exclusion of evidence of this nature—namely, that exclusion (1) encourages (or at least does not discourage) safety measures, (2) prevents a jury from giving unwarranted weight to the fact that a repair was made, and (3) maintains the appearance of fair treatment for those who (as they should) implement changes. The other side of the analysis focuses on the costs of exclusion: (1) relevant evidence is kept from the trier of fact, (2) a heavier burden is placed upon the party seeking to establish that the defendant was negligent or that a defect existed, and (3) admission of the evidence for a limited purpose under an exception to the general rule tends to confuse the jury.

To a great extent, the outcome of this weighing of values depends upon empirical data that is not yet available. For example, no one has been able to say what impact evidence of subsequent remedial measures has upon the mind of a juror or whether admission of the evidence would adversely affect a manufacturer's decision to implement a safety measure.

Given the current lack of data, what should the courts do? The best course of action is probably to abandon the exclusionary rule on a tentative basis—at least until the necessary empirical data become available. Most commentators have recommended that the rule be abolished,[129] and the trend in the courts is to follow this suggestion.[130] The arguments advanced by the commentators[131] and the courts[132] in support of this position seem to be quite persuasive. At the very least, the courts should abandon the rule in all actions brought against mass-producers. Many of the commentators[133] and courts[134] that have recommended the

128. Wis. Stat. Ann. § 904.03 (West 1973) permits courts to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unlike Fed. R. of Evid. 407, the Notes to the Wisconsin Rules do not specify whether this rule applies to the admission of evidence under the feasibility exception to Rule 904.07, Wis. Stat. Ann. § 904.07 (West 1975). It would seem that Rule 904.03 should be applicable, however. *See* D. Louisell & C. Mueller, *supra* note 19, § 165, at 257; Field, *supra* note 27, at 218; *Death Knell to the Exclusionary Rule, supra* note 17, at 227.

129. *See* note 52 *supra*.

130. *See* note 51 *supra*.

131. *See generally* the discussion in Part I *supra*.

132. *See generally* the discussion in Parts I and II *supra*.

133. *See* note 119 *supra*.

134. *See* Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977); Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); Barry v. Manglass, 55 A.D.2d 1, 389 N.Y.S.2d 870 (1976); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976). *But see* Smyth v. Upjohn, 529 F.2d 803 (2d Cir. 1975) (diversity case applying New York law);

abandonment of the rule have based their arguments at least in part on the distinction between mass-producers and other producers. The same evidentiary rule should be applied in both negligence and strict products liability actions, however, since the two theories and the underlying problems of proof are substantially the same.

This does not mean that *all* evidence of subsequent repairs should be admitted. Since the impact on a jury of admitting such evidence is not clear, trial courts probably should apply Justice Clark's test[135] to exclude evidence that, under the circumstances, would be unduly prejudicial, cumulative, or confusing.

SUMMARY

Chart is a beginning toward formulating an answer to what is obviously a difficult question. The decision produces more questions than answers, however. While *Chart* clearly holds that evidence of subsequent remedial measures is admissible under some circumstances in some products liability actions, it does not define the limits of admissibility or even indicate whether there are any limits. This ambiguity is a serious flaw. Litigants are left to guess whether evidence of remedial conduct will be admitted in all products liability cases, only in actions brought on certain theories of recovery or against certain defendants, only when feasibility is in issue, or only when the evidence is not unduly prejudicial, cumulative, or confusing. In short, *Chart* charted the way for admission of the evidence, but not at all well. It is hoped that this article will help practitioners and courts understand this significant but confusing case.

Thomas D. Sykes

Phillips v. J.L. Hudson Co., 79 Mich. App. 425, 263 N.W.2d 3 (1977); Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 573 P.2d 785 (1978).

135. *See* text accompanying notes 74-75 *supra*.